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DISCUSSION

Rethinking the International Criminal Justice Project in the Global South

A dialogue about methodology between TWAIL and ICL

MICHELLE BURGIS-KASTHALA — 20 January, 2017

Concerns about the International Criminal Court's (ICC) continuing relevance in Africa following exit announcements by Burundi, South Africa, and Gambia are widespread. But the picture across the continent is more complex. While some African states have clearly rejected the Court, the majority remain members. How can we explain

the fracturing of the Court's support in Africa? More fundamentally – what is the best way of studying international criminal justice and its effects in the Global South – whether in Africa or elsewhere?

Here I set up a dialogue about methodology between mainstream International Criminal Law (ICL) scholarship and Third World Approaches to International Law (TWAIL). While both are concerned with ending injustice, I argue that a TWAIL emphasis on structural violence is a necessary step towards understanding how ICL might help or hinder the realisation of justice and development across Africa, and beyond.

Why Methodology?

Reflections on methodology are rare in international law. But interrogating dominant approaches reveals not only how scholarship is conducted, but the assumptions behind the very questions being asked. For the bulk of ICL scholarship, there is agreement about the purpose of ICL as a practice: to end impunity, and ultimately, injustice. There is less discussion about the liberal worldview underpinning the ICL project of juridification, criminalisation and individualisation. A liberal perspective informs positivist, doctrinal methodologies centred on jurisprudential analysis. These are ill-equipped for reflecting on the way in which criminal trials narrow our very understanding of 'justice' (see Kamari Clarke, Fictions of Justice), for example, by requiring the attribution of individual guilt.

One reason for the lack of careful, theoretically informed discussion about methodology has to do with law's normative character. This encourages scholarship that

builds consensus at the cost of the demand for external, empirical testing. This explains why, although ICL's purposes are clear – to end impunity through trials and end injustice through deterrence –these outcomes are rarely tested using standard social science methodologies (whether qualitative or quantitative). Thinking about ICL's purposes through its methodology highlights the way this field of practice and scholarship is radically overambitious in its goals and yet radically narrow in the way it seeks to realise them: criminal trials of individuals for extreme and direct violence.

Talking Across the Divide: Bringing ICL into conversation with TWAIL

On the fringes of ICL scholarship as well as within general TWAIL scholarship, there is greater reflexivity about how research agendas are formulated. This is valuable for unpacking the effects of ICL as scholarship and practice – whether in the Global South or the Global North. More critical ICL perspectives – often working on the disciplinary fringes of legal research – can broaden the methodological lens of traditional ICL questions. These perspectives include feminist, anthropological, criminological, and sociological voices.

Such critical voices can serve as a bridge between mainstream ICL methodologies and a TWAIL-informed approach,both for ICL research and for international law more broadly. Although TWAIL is a broad church, four key approaches point to how we could 'TWAIL ICL'. These approaches would foster:

1. Interdisciplinary or transdisciplinary scholarship;
2. A global historicisation of law that is particularly concerned with subaltern perspectives;

3. Examination of the day to day effects of global governance in the Global South. Such examination would be informed by anthropology and sociology, and might look at such things as ICL practices beyond the courtroom;
4. Forms of discourse analysis that are intent on exploring marginal voices and are suspicious of universalising narratives.

Methodological approaches like these would help make sense of how the ICC is being received and rejected in Africa. We can't simply speak here of Africa as a monolith and nor can we think of states speaking for their people.

A keen historical awareness of past and continuing forms of colonial imposition and indigenous repression exposes how ICL often works both for and against those in the Global South. Champions of ICL point to the way it is supposed to redress the most egregious forms of violence by ending impunity (understood as genocide, war crimes, aggression, and crimes against humanity in the ICC Statute), but Tor Krever reminds us that its application is so selective that it in fact reinforces impunity.

Rather than focussing on impunity, a TWAIL account would analyse ICL's dependence on trials that rely on a violence/justice binary and assume that an international criminal trial is the best way to cleanse societies of violence and deliver justice. Such trials are selective in relation to suspects and locations. More importantly, they usually fail to recognise structural, every day forms of violence. Unlike the shocking violence of a machete blow or a bomb blast, slow forms of violence such as racism, apartheid, and colonialism are hard to pin down in a criminal trial. Perhaps recognising this, the ICC has recently turned its attention to destruction of the environment, illegal exploitation of natural resources, illegal dispossession of land, and the protection of cultural

property. TWAIL methodology is crucial for thinking through such forms of structural, historical violence.

How many African leaders fall within the jurisdiction of the ICC is largely irrelevant for the ability of ICL to respond to and redress slow violence. TWAIL reminds us that we cannot speak of one justice, nor one violence. We need to be humble in thinking about solutions. International criminal trials can only ever play a minor role in resisting colonial and neo-colonial governance projects across the Global South.

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